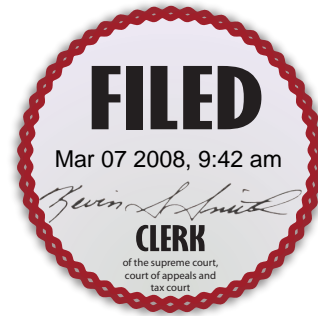


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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ADRIAN HOWARD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0707-CR-396

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila A. Carlisle, Judge  
The Honorable William Robinette, Commissioner  
Cause No. 49G03-0703-FB-49394

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**March 7, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Appellant-Defendant Adrian Howard (“Howard”) appeals his convictions and sentences for Robbery, as a Class B felony,<sup>1</sup> three counts of Criminal Confinement, as Class B felonies,<sup>2</sup> Possession of Marijuana, as a Class D felony,<sup>3</sup> and Carrying a Handgun Without a License, a Class A misdemeanor.<sup>4</sup> We affirm in part, reverse in part, and remand with instructions.

## Issues

Howard raises two issues on appeal, and we raise one issue *sua sponte*:

- I. Whether the trial court abused its discretion in admitting evidence discovered after a traffic stop;
- II. Whether Howard’s convictions for robbery and criminal confinement subjected him to double jeopardy; and
- III. Whether his sentences are inappropriate.

## Facts and Procedural History

Around 9:00 p.m. on March 22, 2007, Howard entered the Advanced Auto Parts store on North Keystone Avenue in Indianapolis. Howard wore a brown sweatshirt with the hood pulled over his head, a dark-colored bandana covering his face below his eyes, brown jersey gloves, whitewashed blue jeans and black tennis shoes with white stripes. Pointing with a black semi-automatic handgun, Howard ordered the two store employees to get on the floor.

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<sup>1</sup> Ind. Code § 35-42-5-1.

<sup>2</sup> I.C. Code § 35-42-3-3(b)(2).

<sup>3</sup> I.C. § 35-48-4-11.

<sup>4</sup> I.C. § 35-47-2-1.

Howard then asked the manager of the store where the money was located and directed him to place the cash into a bag. After the manager placed the money from the cash register into a plastic Advance Auto Parts bag, Howard then ordered the manager to open the safe. After Howard took the money from the safe, he ordered the manager to the ground and left the store through the back exit. During the course of the robbery, Howard threatened to shoot the store manager if he called the police or if they arrived on the scene.

Once Howard left the store, the store manager called the police and provided a description of Howard and his gun. Because Howard used the back door to leave, the manager told the police that he thought Howard would have fled in an eastern direction. Based on this description, local law enforcement was advised over police radio that the robbery suspect was a black male, six feet in height and skinny, wearing a brown jacket, blue bandana, gloves, and carrying a small pistol. Speculating on the direction the suspect may have fled, Officer Aaron Snyder (“Officer Snyder”) drove his squad car to the Willowbrook Apartment complex, located east of the Advanced Auto Parts store. As he drove through the complex, an elderly gentleman stopped Officer Snyder to tell him that he had seen a dark-colored car drive recklessly through the complex. Officer Snyder reported the information over his radio and proceeded to drive around the apartment complex searching for the vehicle, without success.

Shortly thereafter, Officer John Perkins (“Officer Perkins”) arrived at the Willowbrook Apartment complex. He parked his squad car beside Officer Snyder’s in order to exchange information. Then, a group of juveniles approached the officers to tell them that

someone had driven a brown Oldsmobile recklessly through the apartment complex, almost hitting them. As the juveniles were describing the vehicle, the brown Oldsmobile stopped at a nearby intersection within view with a white Lincoln stopped behind it. The kids confirmed that was the same car.

Officers Snyder and Perkins activated their emergency lights and spotlights in order to pursue the brown Oldsmobile. Officer Perkins pulled out of the complex to stop the Oldsmobile, but the Oldsmobile was able to pass Officer Perkins's squad car. As the Oldsmobile passed, Officer Perkins shone his spotlight on the driver and yelled out his open window at the driver to stop. The driver of the Oldsmobile just looked at Officer Perkins and continued to drive. Following closely behind the Oldsmobile was the white Lincoln, preventing Officer Perkins from turning to pursue the Oldsmobile. As the Lincoln passed him, Officer Perkins yelled at the driver of the Lincoln to stop, but the driver failed to yield. Officer Perkins put his squad car in reverse and accelerated to catch up with the Lincoln and repeated his command for the driver to stop his car. After the driver again failed to obey Officer Perkins's order, Officer Perkins, while driving backwards, cut off the Lincoln's path with his squad car. The Lincoln stopped just short of colliding with the police cruiser. Meanwhile, Officer Snyder had successfully blocked the Oldsmobile's path with his cruiser.

Officer Perkins exited his vehicle to reprimand the driver of the Lincoln for failing to follow his commands to stop and then to proceed to assist with the investigation of the driver of the Oldsmobile. As he approached the Lincoln, Officer Perkins observed the driver of the Lincoln locking a blue lockbox situated between the driver and the passenger. The driver

identified himself as Howard and provided his identification. As he spoke with Howard, Officer Perkins noticed a brown hooded sweatshirt laying askew in the backseat, covering a box of ammunition. Howard also appeared to be sweating despite it being a cool spring evening.

After Officer Perkins spoke with Howard about not yielding, he checked Howard's driving records, discovering that Howard's driver's license was suspended. As he returned to the Lincoln, Officer Perkins noticed an unopened package of jersey gloves in the backseat on the driver's side of the Lincoln. Officer Perkins then questioned Howard as to where he had been that night and whether he had any weapons. Howard denied having any weapons or any knowledge as to why the ammunition was in the car. Based on the proximity to the Advance Auto Parts store and the articles in the Lincoln and Howard matching the dispatch description, Officer Perkins instructed Howard to exit the vehicle. As Howard stood up, nine-millimeter bullets fell from his lap onto the ground. Once Howard was out of the car, Officer Perkins could see a wad of money tucked underneath the driver's seat. Subsequently, Officer Perkins took Howard into custody as a possible suspect in the robbery. The store manager of the Advanced Auto Parts store subsequently identified Howard as the man who had robbed the store.

When the Lincoln was later searched pursuant to a search warrant, a backpack containing brown jersey gloves, a dark-colored bandana, a plastic Advanced Auto Parts bag containing \$649, a nine-millimeter semi-automatic handgun, a .357 revolver, a partially filled box of Luger nine-millimeter ammunition, and 57.75 grams of marijuana were found.

The State charged Howard with Robbery, as a Class B felony, three counts of Criminal Confinement, as Class B felonies, Possession of Marijuana, as a Class D felony, and Carrying a Handgun Without a License, a Class A misdemeanor. On May 30, 2007, Howard filed a Motion to Suppress all the evidence found after Officer Perkins stopped Howard. After a hearing, the trial court denied the motion. A jury trial was held after which Howard was found guilty as charged. The trial court sentenced Howard to eighteen years with three years suspended for the count of robbery and each count of criminal confinement. For possession of marijuana, Howard was sentenced to a year and one half, and he was sentenced to one year for carrying a handgun without a license. All sentences were ordered to be served concurrently.

## **Discussion and Decision**

### **I. Admission of Evidence**

First, Howard argues that the trial court abused its discretion in admitting evidence obtained from the traffic stop because the stop was contrary to his Fourth Amendment rights prohibiting unreasonable searches and seizures. Specifically, he avers that Officer Perkins did not have reasonable suspicion to stop him based on the anonymous tips regarding the reckless driving of the brown Oldsmobile. Because Howard is challenging the admission of evidence after a conviction rather than in an interlocutory appeal, the issue is whether the trial court abused its discretion by admitting the evidence at trial. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse the trial court's

ruling only upon a showing of an abuse of discretion. Id. An abuse of discretion occurs where a decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

An investigatory stop of a citizen by a police officer does not violate the Fourth Amendment rights of that individual where the officer has a reasonable articulable suspicion of criminal activity. State v. Ritter, 801 N.E.2d 689, 691 (Ind. Ct. App. 2004), trans. denied. Such reasonable suspicion is determined on a case-by-case basis, in light of the totality of the circumstances. Id. Although the standard of review of a trial court's decision to admit evidence is whether there was an abuse of discretion, the determination of reasonable suspicion is reviewed *de novo*. Id.

Howard's argument that the stop was illegal because the anonymous tips did not rise to the level of reasonable suspicion is misplaced. The alleged anonymous tips were not the basis upon which Officer Perkins stopped Howard's car. Rather, Officer Perkins conducted the stop because Howard failed to obey a basic traffic rule of yielding to an emergency vehicle as well as ignoring an officer's command to yield.

Indiana Code Section 9-21-8-35(a) provides:

Upon the immediate approach of an authorized emergency vehicle, when the person who drives the authorized emergency vehicle is giving audible signal by siren or displaying alternately flashing red, red and white, or red and blue lights, a person who drives another vehicle shall do the following unless otherwise directed by a law enforcement officer:

- (1) Yield the right-of-way.
- (2) Immediately drive to a position parallel to and as close as possible to the right-hand edge or curb of the highway clear of any intersection.
- (3) Stop and remain in the position until the authorized emergency vehicle has

passed.

I.C. § 9-21-8-35(a) (emphasis added). When Howard continued to drive after observing Officer Perkins's flashing emergency lights, he violated this section because he did not yield the right-of-way. Howard did not even stop when ordered by Officer Perkins. Police officers may stop a vehicle when they observe minor traffic violations. Jackson v. State, 785 N.E.2d 615, 619 (Ind. Ct. App. 2003), trans. denied. Officer Perkins observed Howard commit a traffic infraction when he failed to yield the right-of-way, providing Officer Perkins with the requisite reasonable suspicion to stop Howard. Therefore, the trial court did not abuse its discretion in admitting the evidence from the traffic stop.

## II. Double Jeopardy

Next, we raise *sua sponte* the issue of whether Howard's convictions for robbery and criminal confinement as to the store manager violate the constitutional prohibition against double jeopardy. Article I, Section Fourteen of the Indiana Constitution provides that "no person shall be put in jeopardy twice for the same offense." Our Supreme Court has held that two convictions are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution if, "with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).

Here, Howard was convicted of robbery and three counts of criminal confinement. The three counts of criminal confinement were based on two employees and store manager



who were present during the robbery. Robbery consists of taking property “by using or threatening the use of force” or “by putting any person in fear.” Ind. Code § 35-42-5-1. Criminal confinement consists of confining a person or removing them by fraud, enticement, force, or threat of force from one place to another. Ind. Code § 35-42-3-3. Simultaneous convictions of robbery and confinement charges do not violate Indiana’s statutory elements test. Vanzandt v. State, 731 N.E.2d 450, 455 (Ind. Ct. App. 2000), trans. denied.

Under the actual evidence test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Merriweather v. State, 778 N.E.2d 449, 454 (Ind. Ct. App. 2002). For there to be a violation of the actual evidence test, there must be a reasonable possibility that the evidentiary facts used by the fact finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Id.

In Vanzandt v. State, this Court concluded that the defendant’s robbery and criminal confinement convictions violated the tenets of double jeopardy. Vanzandt, 731 N.E.2d at 454-456. The evidence in the case indicated that the only force or threat of force used by the defendant to confine one of the victims was that necessary to accomplish the robbery. Id. at 455. Specifically, the defendant held the two victims, Remington and Kite, at gunpoint, demanded the victims lie on the floor, forced Kite to assist him while he took money from a cash register, and then fled in Kite’s car. Id. The defendant was convicted of two counts of criminal confinement, one based on each victim, and one count of robbery against Kite. Id. at 453. This Court held that only the conviction for criminal confinement as to Kite was a

violation of double jeopardy principles because the robbery count was only alleged against Kite. Id. at 455.

Here, the State charged Howard with robbing the store manager while armed with a handgun and confining the store manager and the other two employees. Howard ordered the two employees to lie down on the ground while he ordered the store manager to assist him in locating the store's money. Once Howard obtained the money, he left. The force used by Howard to confine the store manager was that force necessary to accomplish the robbery. Based on this evidence, there is a reasonable possibility that the jury used the same evidentiary facts to establish criminal confinement of the store manager as it did to establish the essential elements of robbery of the store manager. We therefore order the trial court to vacate the conviction of criminal confinement as to the store manager on remand.

### III. Appropriateness of Sentences

Second, Howard contends that his sentences for robbery and now two counts of criminal confinement are inappropriate under Indiana Appellate Rule 7(B).<sup>5</sup> Our Supreme Court recently reviewed the standard by which appellate courts independently review criminal sentences:

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The burden is on the

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<sup>5</sup> Howard does not challenge his sentences for possession of marijuana or operating a vehicle without a license.

defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

Each of Howard's challenged sentences is a Class B felony, all of which were ordered to be served concurrently. The range of possible sentences for a Class B felony is between a minimum of six years and a maximum of twenty years with an advisory sentence of ten years. The trial court sentenced Howard to eighteen years with three years suspended for each Class B felony conviction.

Regarding the nature of the offenses, Howard entered the Advanced Auto Parts store, carrying a semi-automatic handgun and wearing gloves, a hooded sweatshirt and a bandana to conceal his identity. While brandishing a gun, Howard ordered the employees to get on the ground and threatened to shoot the store manager if he called the police. He forced the store manager to give him money from the store's cash registers as well as the safe and then fled on foot.

As to the character of the offender, Howard has a juvenile record of four true findings, two of which would be D felonies if committed by an adult. The true findings were for Auto Theft, Operating a Vehicle Having Never Received a License, Theft, and Criminal Conversion. Howard also had a true finding for violating probation that was imposed for Auto Theft. At the time of the current offenses, Howard also had charges pending for Battery, Auto Theft and Resisting Law Enforcement. As to the pending charge for Battery, Howard was placed in a diversion program for a year, and if completed, the charge was to be dismissed. However, a notice of non-compliance was filed with the county prosecutor.

Although Howard was only nineteen years of age at the time of this crime, his criminal history demonstrates that he has failed when given the opportunities for rehabilitation. Furthermore, his current offenses are similar in nature to those in his criminal history and have increased in gravity.

Howard asks this Court to consider his young age of nineteen and the fact that his incarceration would be a hardship on his one-year-old child. The evidence regarding Howard's contention of hardship upon his dependent is the testimony that the mother of Howard's son has custody of the child but that Howard took care of his son a majority of the time. Although Howard looked after his son, he was not ordered to pay child support, was not working at the time of the offenses and was living out of his car.

Based on the nature of the offense and the character of the offender, Howard has not persuaded us that his concurrent sentences of eighteen years with three years suspended are inappropriate.

### **Conclusion**

In sum, the trial court did not abuse its discretion in admitting evidence from the traffic stop. However, one of Howard's convictions for criminal confinement violates the principles of double jeopardy. We direct the trial court on remand to vacate the criminal confinement conviction as to the store manager. Finally, we find Howard's sentences for robbery and criminal confinement are not inappropriate.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and CRONE, J., concur.